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No. 595

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

ARTHUR SCHOFIELD, ET AL, *Petitioners*

v.

EZRA TAFT BENSON, Secretary of Agriculture,

and

NEW ENGLAND MILK PRODUCERS' ASSOCIATION, ET AL., *Respondents*

BRIEF FOR RESPONDENTS, NEW ENGLAND MILK PRODUCERS' ASSOCIATION, ET AL. IN OPPOSITION

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OPINIONS BELOW

The October 6, 1956, memorandum opinion of the United States District Court for the District of Columbia and the oral opinion of October 21, 1956, of the District Court are unreported. The opinion of the United States Court of Appeals for the District of

Columbia is reported in 236 F. 2d 719. The three opinions are printed in Appendix B, p. 41, of the petition for writ of certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1956 (R. 791). A petition for rehearing was denied on September 11, 1956 (R. 811). The petition for a writ of certiorari was filed November 26, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a milk producer has standing to challenge an order of the Secretary of Agriculture issued under the Agricultural Marketing Agreement Act of 1937, although such order does not impose any legal duties upon him and does not infringe any of such producer's legal rights.

STATUTES INVOLVED

The statutory provisions involved are the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. § 601 ff. These are printed as Appendix A, p. 21, of the Petition for Certiorari.

STATEMENT

The subject matter of this litigation is the milk-marketing problem. It is common knowledge that the production and marketing of milk are vital and that the problems of the industry have long engaged the notice of the Congress and state legislatures and the courts.

This Court has considered and dealt with the problems of this industry in *Nebbia* v. *New York*, 291 U.S. 502; *Baldwin* v. *Seelig*, 294 U.S. 511; *United States* v. *Rock Royal Co-operative*, 307 U.S. 533; *H. P. Hood and Sons* v. *United States*, 307 U.S. 588; *H. P. Hood & Sons* v. *DuMond*, 336 U.S. 525.

The basic underlying problem of the industry arises from the nature of the product. Since there are daily fluctuations in the demand as well as periodic and seasonal fluctuations in supply, even flow and equal distribution of available fluid milk required to meet normal daily demands in an off-season, as a measure of normal need, may be vastly exceeded by large surpluses in full production months.

Because milk is highly perishable, such surpluses present the most vexing problem of the industry. Fluid milk as a food beverage commands a much higher price than milk utilized in other forms. It is natural that a producer of milk should seek to sell his production in the more profitable fluid-milk market. The public interest, however, requires that there be a normal supply of fluid milk at all times sufficient to meet the demands of the public for fluid milk.

This public interest, as well as a proper regard for the economic status of all producers as related to the economy as a whole, caused Congress to direct its attention to the complexities of the milk industry in the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, et seq.

To effectuate the purposes of the Act, including an equitable distribution of the burden of surplus milk, the Secretary of Agriculture has been given power, after due notice and opportunity for hearing, to issue

orders which are applicable to handlers, but are not applicable to producers or retailers. 7 U.S.C. §§ 608b, 608c, 608c(13).

The Boston Milk Order was issued pursuant to the provisions of the Act and was considered and sustained by this Court in *H. P. Hood & Sons* v. *United States*, 307 U.S. 588. That Order provides for two minimum price classifications: Class I which includes fluid milk and certain fluid milk products, and Class II which includes quantities in excess of what is required to meet current demands for fluid milk, which includes all other milk products such as butter, cheese, milk powder and other like items. It also provides for payment to the producers marketing this milk in the Boston marketing area of a "blended" or weighted average price. The Order also provides adjustments for higher costs principally depending on the location of the plant and the month of production. For example, milk produced in a plant not less than 40 miles from Boston is entitled to a price differential of 52¢ per cwt. of Class I milk and 38¢ per cwt. of Class II milk over milk produced 200 miles from Boston (Ex. 10, Section 904.42, R. 720, 721).

Before the Secretary may issue an Order, he must make two determinations specified in 7 U.S.C. § 608c(9). First the proposed Order must be approved by at least two-thirds of the producers supplying the marketing area specified in the order. In order to ascertain whether such a majority of the producers approves the issuance of an order, the Secretary may conduct a referendum among them and in conducting such a referendum, the statute requires that the approval or disapproval of a cooperative shall be

considered as the approval or disapproval of its members.

Second, the Secretary must determine that the failure of the necessary majority of the handlers to sign a marketing agreement tends to prevent the effectuation of the declared policy of the Act and that the issuance of the order is the only practical means of advancing the interests of the milk producers pursuant to the declared policy.

Pursuant to notice published March 18, 1953 (20 F.R. 1699-1700, Exhibit 2, R. 700), extended hearings were held during the Spring of 1955 on a number of proposals designed to amend the marketing orders regulating the handling of milk in four Massachusetts marketing areas. Among the amendments proposed was one to expand the Greater Boston marketing area so as to include the seven towns of Concord, Framingham, Lincoln, Natick, Sudbury, Wayland and Weston (Exhibit 57, R. 768).

Another proposal was to expand the Greater Boston area so as to include all the cities and towns in Middlesex County. On the basis of the evidence adduced at these hearings, the Deputy Administrator of the Agricultural Marketing Service on August 2, 1955, filed a detailed recommended decision which proposed among other things that the four towns involved in the instant litigaton, namely Framingham, Natick, Wayland and Weston be added to the Greater Boston Marketing Area. Interested parties were advised to file exceptions by September 2, 1955. Exceptions challenging the sufficiency of the evidence on which the recommended decision was based were filed by four local dairy groups (R. 20-23).

The Commonwealth of Massachusetts also filed exceptions claiming that only producers located in the four towns, rather than all producers serving the Greater Boston Area, should be permitted to participate in the referendum to be held under 7 U.S.C. § 608c(19).

On September 13, 1955, the Acting Secretary of Agriculture overruled these exceptions and issued his decision recommending the inclusion of the four towns in the Greater Boston Marketing Area and directing that a referendum be conducted to determine whether a sufficient percentage of the producers favored the issuance of an order to that effect. (R. 27-61, 21 F.R. 6932-6939). The Acting Secretary made the following pertinent findings of fact:

> "*Findings and conclusions* — 1. *Boston Area extension.* The limits of the Greater Boston marketing area should be extended to include the towns of Framingham, Natick, Wayland and Weston. The marketing area as presently constituted includes 38 contiguous Massachusetts cities and towns comprising a substantial portion of the Greater Boston metropolitan area. A substantial cooperative association of producers proposed that the area be extended to include the seven additional towns of Framingham, Natick, Wayland, Weston, Sudbury, Concord and Lincoln. Another proposal would extend the area to include all of that portion of Middlesex County not presently under Federal regulation.
>
> "The four towns herein recommended for inclusion in the marketing area are a part of Boston's suburban area and lie directly west of and are contiguous to the present marketing area. The towns of Framingham and Natick, in particular, are experiencing a very dynamic transi-

tion to an intensive residential and industrial area. The proximity of this four-town area to Boston and its location with regard to modern transportation facilities have played an important role in its rapid development and there is every indication that the rapid urbanization will continue.

"The four-town area herein under consideration is served by approximately 30 handlers, 14 of which are fully regulated Boston or Worcester handlers. While statistics on relative volumes, numbers of routes and similar quantitative data are lacking there is no question but that regulated Boston handlers are the primary handlers serving this area and that such distribution is substantial.

"The Hood Company, one of the principal Boston handlers, serves most of this four-town area from its Natick plant, a loading station which is supplied from its East Bridgewater plant, primarily with unregulated milk. Under usual circumstances, it would be expected that location with respect to Boston would direct that this area be served from Hood's Boston City plant. Testimony of responsible witnesses, however, indicates that the unregulated East Bridgewater plant is used in order to meet unregulated competition in the area.

"A substantial portion of the annual volume of milk handled at the East Bridgewater plant is Boston pool milk which is fully priced under the order. However, the record is clear that much of this volume is flavored milk and milk in special packages disposed of throughout the much larger area served by the East Bridgewater plant. Solely as a matter of processing economy it is handled in the Boston city plant and then transferred to Bridgewater for distribution. In addition, Boston pool milk is requisitioned whenever local producer milk and available unregulated supplies are less

than minimum needs. Hence, while total receipts of regulated milk at the Bridgewater plant may be of such volume as to possibly equal, or even exceed, Hood's fluid distribution in the recommended area of extension, much of this milk is special packaged milk and flavored milk disposed of outside of this area. It is obvious that the company enjoys an advantage through its ability to use unregulated milk, purchased at or about the Boston blend to supply much of its regular fluid requirements for this four-town area, in competition with handlers who are fully regulated under the Boston order.

"The record shows that in addition to the Hood Company other substantial dealers not under Federal regulation who distribute in this area obtain much of their fluid requirements from unregulated country plants in Vermont and New Hampshire. In this respect their advantage over regulated Boston handlers distributing in the area is similar to that of the Hood Company.

* * * * *

"Producers delivering milk to local dealers opposed any extension of the marketing area, contending that their participation in the Boston pool would result in substantial financial loss to them. There is no question but that the producers supplying milk to local dealers serving the area herein recommended for inclusion have had a preferential market for their milk. These producers have generally received a straight Class I price for all of their milk. This has been possible because local production is adequate to supply only a small part of the total fluid milk needs of the area. Local dealers obtain a substantial part of their total fluid requirements from unregulated upcountry plants in New Hampshire and Vermont or from the Boston pool. While the record is not clear in regard to the

manner in which this milk reaches the local dealers' plants or the cost of such milk it is significant that the largest handler serving the area has used unregulated milk, purchased at or about the Boston blended price to meet competition in the area.

"The additional towns herein recommended for inclusion are a part of the natural area of distribution for Boston handlers who presently do a very substantial business there. Local production is insufficient to supply these towns which therefore must look to the Boston pool for an assured long-run milk supply. All producers having a bona fide association with the fluid market should share equitably in the proceeds from sales in the market. The present pooling and pricing scheme under the Boston order will promote this principle."

The decision directed that the referendum be held among those producers who during the month of April, 1955, determined to be the representative period were engaged in the production of milk for sale in the Greater Boston Marketing Area as then defined, as well as in the four towns to be added to the area pursuant to the proposed amendment.

Pursuant to this decision, the referendum agent made up the list of producers qualified to vote in the referendum (R. 75-78). The names of the producers supplying the Greater Boston Area were taken from the records of the Market Administrator. Those records disclosed that 12,297 producers supplied the marketing area. Of these 9,089 were members of cooperatives and 3,208 were not. The referendum agent also found that more than 10,000 of the producers supplying the Greater Boston Marketing Area sent

milk to plants from which milk was moved directly or indirectly to consumers in the four-town area proposed to be added (R. 75, 76).

In order to determine the names and addresses of producers not presently supplying the Greater Boston Marketing Area who were producing milk for sale in the four-town area, the referendum agent made detailed inquiries of the Massachusetts Milk Control Commission and of handlers supplying the area. On the basis of this information, he found that there were 677 additional producers entitled to vote of whom 93 were residents of Massachusetts (R. 76-79).

On September 16, 1955, the referendum agent mailed ballots to those cooperatives of which eligible producers were members and to those eligible producers who were not members of the cooperatives advising them that if their votes were to be considered, they would have to be received or post-marked not later than September 23, 1955 (R. 83).

On September 19, 1955, the petitioners, President and Secretary of the Central Massachusetts Dairy Association, purporting to act on behalf of themselves and of the other members of the Association similarly situated, filed a complaint in which they attacked the validity of the Secretary's decision as being contrary to the evidence and arbitrary and capricious and complained particularly of the manner in which the referendum was being conducted. They allege upon information and belief that if the order were extended to the four towns, local milk producers would lose 50¢ per cwt. milk, or on the average, $1,000 per annum. The complaint asked for permanent and

interlocutory relief enjoining the completion of the referendum.

At the time of filing the complaint, appellees applied for and were granted a temporary restraining order enjoining the Secretary from conducting, consummating or effectuating the referendum. This order was vacated on September 21, 1955, on the basis of a stipulation pursuant to which the Secretary agreed not to issue any order until after argument and determination of the petitioner's motion for preliminary injunction. The referendum was thereupon concluded and the results were tabulated by the referendum agent. According to the tabulation, the proposed order was approved by a vote of 9,698 to 107. The vote of those covered in the original Greater Boston Marketing Area was 9,258 to 61. Producers supplying the four-town area but not previously included in the Boston pool favored the order, 440 to 46 (R. 84).

The petitioners amended their complaint and asked for a preliminary injunction enjoining the Secretary from amending the present Boston Marketing Order. They also filed a motion for a three-judge court in conformity with 28 U.S.C. §§ 2282 and 2284.

On September 27, 1955, a hearing on petitioners' motion for a preliminary injunction was held before Judge Pine. Petitioners argued that they would suffer irreparable harm if the Secretary of Agriculture issued an order incorporating the four towns into the Boston Marketing Area.

In addition, counsel for the petitioners made strong representations to the effect that there was no evidence to support the Secretary's findings and that they were a tissue of falsehoods. The District Court stressed in

its oral opinion "that petitioners' attorney had stated as a member of the bar that there was no evidence to support the findings, that the verified complaint contained the same allegations and that all I have against that is your (Government counsel's) statement that there is evidence to support it." (R. 194-195).

The memorandum decision of October 6, denied the motion for a three-judge court holding that no substantial constitutional question was involved as that issue was long since settled in the affirmative by the Supreme Court in *United States* v. *Rock Royal Coop.*, 307 U. S. 533. The court, however, held that the petitioners were entitled to a preliminary injunction.

Before the preliminary injunction was actually issued, the Secretary moved for a modification of the decision. The District Court rejected the Secretary's petition. Prior to the filing of the memorandum opinion of October 7, a certified copy of the record of the administrative hearing and the answer of the Secretary was filed.

On October 18, 1956, New England Milk Producers' Association and other cooperative associations representing producers marketing milk in the Greater Boston Marketing Area filed a motion to intervene as defendants and on October 20 a similar motion was filed on behalf of United Farmers of New England and other cooperative associations similarly engaged. These motions to intervene were allowed November 16, 1956 (R. 306).

Appeals from the order of the District Court granting the petitioners an injunction and from the order denying the motion of the Secretary for modification were taken by both the Secretary and

the Intervenors. On June 29, 1956, the Court of Appeals handed down its decision holding that the complaint was prematurely filed and in addition holding that the plaintiffs had no standing to bring this action in any event.

A petition for rehearing *en banc* was filed by the petitioners and was denied September 11, 1956. On October 18, 1956, the District Court entered an order in conformity with the opinion of the Court of Appeals dismissing the complaint and on October 18, 1956, the Secretary of Agriculture issued the amended order to become effective November 1, 1956 (21 F.R. 8131).

ARGUMENT

The Petitioners Have No Standing to Challenge the Order

The petitioners lack standing to challenge the order, because it imposes upon them no legal obligation nor does it deprive them of any rights.

The Act imposes legal obligations upon milk handlers. It expressly provides that orders issued by the Secretary shall not be applicable to any producer in his capacity as a producer (7 U.S.C. § 608c (13)(B). (Petition for Certiorari, p. 34). These petitioners are producers and bring this action in their capacity as producers. Their complaint of the adverse effect of the order upon them is therefore not of a legal nature. They complain that the effect of including the four towns in the Boston marketing area under the order will be to reduce the returns which they will receive for their milk.

This result is purely of an economic nature. The prices established by the order are minimum prices. There is no provision of the order which prohibits

or prevents any handler from paying to the Petitioners a higher price. Neither the Act nor the order require producers to do or refrain from doing anything. The petitioners have not shown interference or prospective interference with any legally-protected right. In order to have standing to challenge the order, the petitioners must show that an act of the Secretary amounts to an interference with some legal right of theirs. *Stark* v. *Wickard,* 321 U.S. 288, 290.

Petitioners must show more than an economic disadvantage. In the absence of a legally protected right, petitioners lack standing to sue. *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924, 934, certiorari denied 350 U.S. 884; *United Milk Producers of New Jersey* v. *Benson,* 225 F. 2d 527.

In *Stark* v. *Wickard,* 321 U.S. 288, upon which petitioners rely, the producer was held entitled to challenge an order which infringed a legal right of his, namely the making of an unauthorized deduction from the fund belonging to the producer. No such situation appears in this case. Here petitioners merely allege that if the order is extended and made applicable to the handlers to whom they deliver their milk, they will suffer economic disadvantage.

Mere loss of income in consequence of the action of Government or economic disadvantage, by itself, constitutes *damnum absque injuria* which does not confer standing. *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924, 934; *Stark* v. *Wickard,* 321 U.S. 288.

The Administrative Procedure Act does not give status to challenge administrative action where legal injury is not suffered by the petitioners. Section 10

of that Act gives a right of judicial review to one who can establish he has suffered legal wrong as the result of agency action. Unless the producer can show a legal wrong, he has as little standing to sue as a consumer. *Alabama Power Co.* v. *Ickes,* 302 U.S. 464; *United Milk Producers of New Jersey* v. *Benson,* 225 F. 2d 527, 529; *Stark* v. *Wickard,* 321 U.S. 288, 290.

Section 10 of the Administrative Procedure Act requires something more than a mere adverse personal effect. The adverse effect must be an illegal effect. Report of Senate Committee on the Judiciary on S. 7, Senate Report No. 752, 79th Congress, 1st Session, p. 212.

Constitutionality. The motion of petitioners in the District Court that a three-judge court be convened (R. 74) was denied with a finding that no substantial question of constitutional validity existed, as that issue was long since settled in the affirmative by the Supreme Court in *United States* v. *Rock Royal Co-op.,* 307 U.S. 533 (R. 201). The Court of Appeals assumed the constitutionality of the Agricultural Marketing Agreement Act of 1937.

In their petition, petitioners seek to have this Court reverse its conclusions of constitutionality of the act on some tenuous and nebulous ground that the commerce clause of the Constitution is a limited grant of power to regulate interstate commerce. This very question was given careful consideration by this Court in *United States* v. *Rock Royal Cooperative,* 307 U.S. 533, 569, where it was held "where sales for interstate transportation were commingled with intrastate transactions, the existence of local activity did not interfere with the Federal power to regulate the

whole." * * * "The power over commerce when it exists is complete and perfect." *Currin* v. *Wallace,* 306 U.S. 1; *Minnesota Rate Cases,* 230 U.S. 352, 358.

There is no occasion to reconsider this doctrine; it has already been reviewed as to the substance of the constitutional issues involved. The Court has said:

> "This Court has pointed out many times that the exercise of the federal commerce power is not dependent on its maintenance of the economic *status quo;* the Fifth Amendment is no protection against a congressional scheme of business regulation otherwise valid, merely because it disturbs the profitability or methods of the interstate concerns affected."

American Trucking Assns. v. *United States,* 344 U.S. 298, 322, fn. 20; *Currin* v. *Wallace,* 306 U.S. 1, 13-15; *United States* v. *Rock Royal Co-op., Inc.,* 307 U.S. 533, 572-573.

Nowhere in the Agricultural Marketing Agreement Act is there any definition of what constitutes a marketing area. The Act authorizes a marketing agreement and order to be issued for such production or marketing regions or areas as are practicable. *United States* v. *Rock Royal Co-op.,* 307 U.S. 533, 576. The Secretary has found on the basis of the evidence adduced at the hearing that the four towns here involved are a part of Boston's suburban area and lie directly west of and are contiguous to the present marketing area (R. 29) and that a substantial portion of the milk distributed in this four-town area comes from Boston handlers and that these Boston handlers are the primary handlers serving this area in question (R. 30); that these four towns are a part of the

natural area of distribution for Boston handlers who presently do a very substantial business there (R. 31).

In view of these findings of the Secretary, it is clear that in issuing the order adding the four towns in question to the marketing area, the Secretary was acting within the area of the authority granted to him by the act.

These respondents respectfully submit that the petitioners fail to show any basis upon which a constitutional question may be raised.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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